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Supreme Court of the United States

OCTOBER TERM, 1932. No. 48.

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI,
Petitioner,

against

PHILIP ELTING, Collector of Customs of the Port of New York,
Respondent.

BRIEF IN BEHALF OF THE PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1932. No. 48.

LLOYD SABAUDO SOCIETA ANONIMA PER AZIONI,
Petitioner,

against

PHILIP ELTING, Collector of Customs of the Port of New York,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN BEHALF OF THE PETITIONER.

This case comes before the Court on a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Fifteen causes of action for recovery of fines imposed under the Immigration Laws were stated (R. 1-21). Twelve were dismissed. On cross appeals the Circuit Court of Appeals dismissed a thirteenth cause of action.

JURISDICTION.

The order on mandate below was entered on February 8, 1932 (R. 415).

Jurisdiction of this Court is provided by 28 U. S. C. s. 347 (a).

Certiorari was granted on May 23, 1932 (R. 416), 286 U. S. 539.

Opinions Below.

The opinion of the Circuit Court of Appeals was written by Judge Chase, Judges Manton and A. N. Hand concurring (R. 409-415). It is reported 55 F. (2d) 1048, 1932 AMC 244. The opinion of District Judge Patterson appears at pages 350-361 of the record and is reported 45 F. (2d) 405, 1930 AMC 1620.

Statutes Involved.

The statutes involved are Section 9 of the Immigration Act of February 5, 1917 and the same section as amended and re-enacted in the Immigration Act of 1924 (8 USC Sec. 145, 39 Stat. 880, 43 Stat. 166). The only change material to this case made in 1924 was an increase in the amount of the fines. The Statute as amended provides in part:*

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeblemindedness, epilepsy, constitutional psychopathic inferiority,, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall

* See Appendix for complete text.

pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in section 3 of this act, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $250, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien for whose account assessed. * * *"

The Facts

A case which is illustrative of the facts in these cases is the case of Giuseppe Fusco (10th cause of action). As disclosed by the record of the proceedings before the Secretary of Labor (R. 277-292), Fusco, aged 53, resided in Mezzano, Caserta, Italy, with his wife and six of his 8 healthy children. A son, an American citizen (R. 289), in comfortable circumstances (R. 291), and a married

daughter, resided in Phoenixville, Pennsylvania. In the summer of 1926 Fusco decided to return to the United States, in which he had resided for 15 years, since 1901, having freely entered and left the country 5 times, to visit his American children (R. 288).

He was examined by surgeons of the Royal Italian Emigration Service in Naples, found free from disease or any symptoms of disease, and was granted an Italian passport on September 20, 1926 (R. 282, 286). The American Consul at Naples issued to Fusco a quota visa on October 1, 1926, to which was attached a certificate of a competent practicing physician who enjoyed the confidence of the American Consul, which certified that Fusco was free from any contagious disease or any other physical defect which might debar him from admission to the United States (R. 282, 207, 209). This visa and medical certificate came into the possession of the Secretary of Labor by virtue of his rules (Rule 3, subdivision G, par. 3, Regulations, July 1, 1925; Appendix, *infra*). Such a visa under the 1924 Act is a separate document based upon a verified application by the alien of the character set forth in the record, page 210 (Act Secs. 2 and 7, 8 U. S. C. 202, 207).

Just before embarkation Fusco was examined by the line's medical examiners, who also found him to be free from tuberculosis or any symptoms of the disease (R. 282).

Fusco embarked on petitioner's *S. S. Conte Rosso* at Naples on October 13, 1926, and arrived at New York October 23 (R. 288).

The foregoing facts were supplemented by depositions and the testimony of witnesses (R. 27-68, 70-76, 80-109, 109-116) offered at the trial, which established:

That at Naples the petitioner maintained regularly two and sometimes three resident physicians, whose duty it was

to examine all aliens seeking passage to the United States; that at both Naples and Genoa, the only ports of embarkation, a place had been established, called the Emigrant House, properly equipped for such examinations, and at that place the company physicians under the supervision of a doctor attached to the Royal Italian Emigration Service, made careful physical examinations of all immigrants the day before embarkation. At these examinations notations were made of any case suspected of disease or disability, and on the day of sailing all immigrants were again examined at the pier, special attention being given to the cases noted as doubtful.

The final examination at the pier was conducted on the day of sailing by a commission created by Italian Emigration Laws, which consisted of at least three doctors and usually two laymen. At that examination every person found to be afflicted with or even suspected of being afflicted with any disease or disability which might bar his admission to the United States, was refused permission to sail. This was no empty formality as is shown by the numerous rejections referred to in the testimony of Dr. Valenzi (R. 39-43).

In addition to the foregoing examinations each alien, as a prerequisite to the granting of a visa, had been required by the American Consul to present a medical certificate issued by a physician specially designated by the Consul to make such examinations and all quota immigrants had been required by the Italian Law to undergo physical examinations as a prerequisite to the issuance of passports.

The result was that before embarkation, every quota immigrant had been submitted to four physical examinations and every non-quota immigrant had undergone three such

examinations (see depositions of Doctors Musu, Izzo and Reale on deposit with the Clerk of this Court).

The examinations at the Emigrant House included clinical examinations by such means as the stethoscope, microscope, magnifying glass, Wasserman test, &c., by outside specialists, to whom the immigrants were sent, whenever the examining doctor suspected that a disease might exist which might be discovered by such methods (Deposition, Dr. Reale, pp. 10-13).

These examinations were conducted in such a manner and with such minuteness that they would have disclosed the existence of any disease or disability which would bar admission to the United States if the disease or disability existed at that time (Deposition, Dr. Baldovino, pp. 8-9). In reporting to the Italian Emigration Service on the effectiveness of such examinations Dr. Baldovino said:

"No sick man, suffering from an infectious disease, passes unobserved through the various tests of which the examination is composed. The sifting of those fit to embark is a sure one."

The foregoing precautionary measures have been in effect and practiced by petitioner for many years and were designed to meet the requirements of the immigration laws of the United States beginning with the Act of 1903, as construed by this Court in the case of *Oceanic Steam Navigation Company* v. *Stranahan*, 214 U. S. 320, and by the report of the Senate Committee, referred to in that case, in reporting on the Act of 1903 which, among other things, said that the provisions of the law leave in the hands of Steamship Companies "the power to escape even a risk of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by a competent medical authority to be entirely cured."

In this practice the petitioner had the full cooperation of an Italian law relating to the subject of emigration and of the Italian Emigration Service set up thereunder for the purpose of avoiding the embarkation of emigrants who were not physically fit to embark, including those who might not meet with the requirements of the American Immigration Laws. This cooperation went to the extent that doctors attached to the Italian Emigration Service were regularly assigned to the Immigrant houses to supervise all examinations by doctors employed by Steamship Companies. The Italian law also laid upon the Steamship Companies the cost of repatriation and compensation for loss of time of any alien rejected upon arrival in the United States (Deposition of Eugenio Verando filed with the Clerk of this Court, pp. 1 to 10, inc.). It was in pursuance of this general policy that the aliens in this case were subjected to thorough examinations jointly by doctors of the petitioner and of the Italian Emigration Service, with whose conclusions the two doctors at Ellis Island so completely disagreed.

The doctors who examined these immigrants, and their qualifications, were as follows:

Genoa.

1. *Candido Baldovino,* practitioner of medicine and surgery since 1899. Graduate University of Pavia. Lieutenant Colonel in the Royal Italian Navy, director of the Emigrant House in Genoa from 1926 to 1928. See his deposition, pages 4 to 9, inc.

2. *Dr. Giovanni Valenzi.* Graduate University of Turin. In practice since 1911. Ship's surgeon for Lloyd Sabaudo since January, 1921. R. 27 to 29, inc.

3. *Dr. Pietro Dandini De Sylva.* Graduate medical school, University of Rome. In practice since 1915. Surgeon on vessels of Lloyd Sabaudo from 1922 to 1926. R. 81-82.

4. *Dr. Curzio Valentini Duranti.* Graduate of the medical school, University of Rome. In practice since 1892. He was the doctor attached to the office of the Inspector of Immigration in Genoa. See deposition at pages 3 and 4.

Naples.

1. *Dr. Sebastiano Musu.* Graduate School of Medicine and Surgery, University of Naples. Lieutenant Colonel Royal Italian Navy. In practice since 1904. Resident doctor of Lloyd Sabaudo at Naples. See his deposition, pages 7 and 8 and pages 9 and 10.

2. *Dr. Nicolo Izzo.* Graduate Medical School, University of Naples. In practice since 1904. Lieutenant Colonel Royal Italian Navy. At one time in charge of Emigrant House at Naples, familiar with operations at Emigrant House from 1911 to 1928, inclusive. See his deposition, pages 12 and 13, also page 26, as showing knowledge of immigration laws.

3. *Dr. Frederico Reale.* Graduate of University of Naples. In practice since 1898. He was connected with U. S. Public Health Service at Naples since 1902. See his deposition, pages 2 and 3 and page 9.

Ellis Island itself has deported for diseases or physical disabilities only 116 out of 99,236 carried by this line (R. 78, 116). No question can be presented as to the thoroughness with which Fusco and other aliens were examined (R. 33-36, 83).

Fusco was taken to Ellis Island upon arrival, and on November 1, 18 days after embarkation, was privately examined there by two doctors who certified him to be "afflicted with *tuberculosis pulmonary chronic* which is not easily curable. In our opinion the condition herein certified might have been detected by competent medical examination at the foreign port of embarkation" (R. 288). The Line was not represented at that examination and no clinical record of the alien's condition was submitted to the Secretary of Labor.

November 4, 1926, Fusco appeared before a Board of Special Inquiry at Ellis Island. He was asked a few formal questions, not touching on his alleged illness, was told that he was excluded and had no right to appeal. Fusco was not represented. The Line was not even notified. November 16, 1926, Fusco returned to Italy (R. 288-290).

November 26, about the date Fusco arrived in Italy, the office of the Commissioner of Immigration for the Port of New York, notified petitioner of an intention to impose a fine of $1,000 and to require the refund of $95 passage money, based on the certificate of the examining surgeons, and stated:

"If you desire a hearing as to whether a fine should be imposed in this instance, you will be allowed 60 days from the date of this notice for that purpose * * *" (R. 280).

On January 26, 1927, petitioner filed a protest supporting the facts above stated. Duly authenticated certificates of the physicians who made the examinations before embarkation were attached (R. 281-286). This protest and the affidavits of the physicians were accepted by the Department. No criticism was made as to the form of the evidence, nor was the Petitioner requested to amplify it in any respect.

In accordance with the usual practice, the Commissioner of Immigration at New York forwarded the minutes of the Board of Special Inquiry, together with the evidence submitted by the Petitioner to the Labor Department at Washington. The proofs were submitted in the usual form (R. 120, 136-137).

On February 7, 1927, a decision was announced, signed, not by the Secretary of Labor, but by the Commissioner General and the Second Assistant Secretary, which said in part:

"The protest of the Line * * * has been reviewed, together with the medical certificates forwarded therewith * * *" (R. 277).

The decision recognized that, according to the protest and medical certificates submitted, Fusco had been examined on three separate occasions by competent physicians before embarkation and that no trace of tuberculosis was discovered, and that if in existence at the time of embarkation it was not detectable, it then proceeded (italics ours):

"The alien gave no history of the disease. Indeed he was not questioned with regard thereto, *and the only evidence in the record is the official certificate itself.* The Line's protest, in effect, is merely that the disease was not detected despite three examinations and therefore was not detectable * * *. *It is believed that the evidence placed in the record* by the company is not sufficient to call in question the accuracy of the opinion expressed in the official medical certificate" (R. 278).

The decisions imposing fines were written by John W. Browning, a civil service employee in the Department of Labor, formerly an army officer (R. 131, 133).

Browning, who was put on the witness stand by the Government (R. 131), testified that he did not consider the proof

submitted by the Line as evidence (R. 132); that he regarded himself as "an Appellate Court" (R. 136) and considered the protests merely as pleas or comment on the evidence.

The fine and passage refund were paid under protest to the respondent under the duress of his refusal, otherwise, to grant clearance to petitioner's ships (R. 1-26).

In some of the cases there are additional facts which present additional questions. One alien (Cause of Action 15) was excluded as an imbecile after having been brought to the United States by special permission of the Department of Labor with knowledge of his condition; another (Cause 13) was patently blind but had been granted a visa by the American Consul to come to the United States as a student under a special proviso of the Immigration Law; two others (Causes 5 and 12) were coming to the United States to go in transit to Canada and another (Cause 14) was a seaman coming to ship foreign. The fines in cause of action 2, 3 and 13 were imposed under the second sentence of the Act and involve the additional question of the effect of the disability on the earning power of the alien. Fines were imposed in all of those cases, and the propriety of such fines depends upon considerations additional to those presented in the case of Fusco.

The Pleadings and Proceedings Below.

Fifteen causes of action were stated in a common law action before Patterson, J., and a jury of one. The first to the ninth causes of action, inclusive, involve fines which were collected under Section 9 of the Immigration Act of 1917, which provided for penalties of $200 in cases of disease and $25 in cases of physical disabilities, together

with a refund of passage money to the alien. Of those causes of action, two were cases of fines imposed on account of aliens with a physical disability (causes of action 2 and 3) under the second sentence of the Act, and seven were cases of fines for prohibited disease, etc., under the first sentence of the Act. The Trial Judge allowed a recovery in the ninth cause of action because the alien, although initially rejected, was eventually admitted. He dismissed the others. That action was upheld on appeal.

The fines involved in the remaining six causes of action were collected under Section 26 of the Immigration Act of 1924, which provided for fines of $1000 in cases of disease, etc., and $250 in cases of physical disability, together with refund of passage money. All of those causes of action, except cause of action 13, involved prohibited diseases. Special circumstances were involved in causes of action 13 and 15, which will be dealt with separately.

The Trial Court allowed recovery of the fines in the 11th cause of action on the ground that the alien although initially rejected was eventually admitted and in the 15th cause of action for special reasons hereafter discussed. He dismissed the others. On appeal the ruling of the Trial Judge was affirmed as to all these causes of action except the 15th cause which was reversed.

At the trial, evidence was offered by oral testimony and Italian depositions, showing that competent examinations were made abroad and that the diseases were not discoverable at the time of embarkation. The Trial Judge conceded that the testimony tended to show in considerable detail that all passengers were put through at least two examination by skilled doctors (R. 352); but excluded from consideration all evidence not presented to the Secretary of Labor and held that the determination of the

Secretary was conclusive on him as to all facts, if there was the slightest evidence in support of his conclusion. He held the certificate of the American doctors to be such support although criticizing it as legal proof (R. 355). He admitted that on petitioner's construction of the case of *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320, he should at least try fundamental questions; but declined to do so on the ground that the secretary's "satisfaction" and not the actual fact of discoverability by competent examination was the fundamental, or as he called it, the crucial question (R. 354). He did hold, however, that if American doctors had made the examinations in Italy, the decision of the department could not be sustained (R. 361).

The Circuit Court of Appeals affirmed, holding that the fact of actual examinations was immaterial because "what will satisfy the secretary in that regard," is all that is necessary to impose the fine.

ERRORS ASSIGNED AND RELIED UPON BY PETITIONER.

1. The Courts erred in upholding the constitutionality of this Act which, as construed, vested in an administrative officer the final power to determine liability and exact fines of $1,000 and refunds of passage money.

2. The Courts erred in excluding from consideration competent evidence which showed that the aliens were subjected to competent medical examinations before embarkation and that such examinations did not disclose the existence of any disease or disability which might bar the aliens from admission to the United States.

3. The Courts erred in upholding the action of the Department of Labor imposing and collecting these fines on the record before it.

Summary of Argument.

1. The Act under consideration, as construed and applied by the lower courts, vested in an administrative officer the exclusive jurisdiction to determine liability for fines notwithstanding such determination amounted to a case arising under the laws of the United States of which general jurisdiction had been vested in the Courts of the United States by Article 3, Section 2 of the Constitution, the Judiciary Act (28 U. S. C. 41-1 and 41-9) and by Section 25 of the Immigration Act of 1917.

The severity of the penalty provided was such that the accused was entitled, as a matter of constitutional right, to a judicial determination of liability, at some stage, in a civil or criminal action. *Lipke* v. *Lederer,* 259 U. S. 557; *Regal Drug Co.* v. *Wardell,* 260 U. S. 386; *United States* v. *Regan,* 232 U. S. 37; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127; *Dukich* v. *Blair,* 3 Fed. (2d) 302; appeal dismissed 270 U. S. 670.

Oceanic Steam Navigation Co. v. *Stranahan,* 214 U. S. 320, is not authority to the contrary because the penalties there involved were $100 and under, which were less than 10% of the amount provided in the present Act, and because, unlike the present case, no question of fact was involved.

Constitutionality of the present Act can be upheld only by a construction permitting determination, either initially or eventually, by plenary judicial trial, as indicated in *Elliot* v. *Swartwout,* 10 Pet. 137; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Phillips* v. *Commissioner,* 283 U. S. 589; *Lipke* v. *Lederer,* 259 U. S. 557; *Lehigh Valley R. R.* v. *Commissioners,* 278 U. S. 24; *Ohio Valley Water Co.* v. *Ben Avon*

Borough, 253 U. S. 287; *United States* v. *Clyde S. S. Co.* (C. C. A. 2), 36 F. (2d) 691.

The Act provides that District Courts shall have jurisdiction of all causes arising under it (8 U. S. C. 164). This is such cause.

The function of determining liability for severe penalties is not like the ordinary functions of a regulatory or routine nature or requiring special knowledge, which are committed to administrative officers, such as the classification of imports under the Tariff Laws, classification of mail matter under the Postal Laws, regulatory action, usually looking to the future, as in the case of the Tariff Commission, the Interstate Commerce Commission and the Federal Trade Commission. The function here in question is punishment of a clearly defined statutory offense on a determination of past facts. Although clearly judicial in nature, the lower courts have held that it may validly be committed to an administrative officer without any provision for a review by either judicial or administrative action.

The Act as construed and applied below violates the Fifth Amendment to the Constitution and disregards the constitutional separation of powers of government. *Springer* v. *Philippine Islands*, 277 U. S. 189; *Cf. Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

2. Assuming that the power to impose the fines provided by this Act may validly be committed to the Secretary of Labor, the power to act exists only in those cases wherein a carrier, bringing a diseased or disabled alien to the United States, has failed to perform in good faith the obligation to subject the alien to a competent medical examination before embarkation. *Oceanic Steam Navigation Co.* v. *Stranahan, supra.*

Competent evidence, tending to establish that the Petitioner had caused each of the aliens involved in this case to undergo at least three competent medical examinations before embarkation and that as a result of such examinations they were certified to be free from symptoms of any disease or disability which might bar them from admission to the United States, was offered upon the trial of the case but was rejected and refused consideration in the courts below. That evidence went to the fundamental question of the jurisdiction or power of the Secretary to act. Its rejection was reversible error. *Crowell* v. *Benson*, 285 U. S. 22; *Ng Fung Ho* v. *White*, 259 U. S. 276; *In re Fassett*, 142 U. S. 479; *In re Grimley*, 137 U. S. 147; *Smith* v. *Hitchcock*, 226 U. S. 53; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Federal Trade Commission* v. *Klesner*, 280 U. S. 19; *Miller* v. *Horton*, 152 Mass. 540; *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643.

3. The fines were improperly imposed on the basis of the evidence before the Secretary of Labor:

a. Because the action of the Department in treating the opinion of the American Health Surgeons conclusive as to the discoverability of the diseases before embarkation was reversible error of law. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

b. There was no evidence before the Secretary of Labor which fairly supported the finding of liability. *Matter of Case*, 214 N. Y. 199; *Gegiow* v. *Uhl*, 239 U. S. 3; *Chin Yow* v. *U. S.*, 208 U. S. 8; *Tisi* v. *Tod*, 264 U. S. 131; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Johnson* v. *Damon*, 16 Fed. (2d) 65; *Mason* v. *Tillinghast*, 27 Fed. (2d) 580.

c. The Secretary had in his control evidence which established the Petitioner's innocence, but such evidence was not considered or incorporated in the record of the proceedings before the Department of Labor, thus depriving the Petitioner of a fair hearing. *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Chin Yow* v. *U. S.,* 208 U. S. 8.

d. The judicial function of determining liability for the fines was delegated to subordinate officers. Such power cannot be legally delegated. *Runkle* v. *U. S.,* 122 U. S. 543; *N. J. Wholesale Drug Co.* v. *Brown,* 289 Fed. 108; *Bay State Wholesale Drug Co.* v. *Potter,* 277 Fed. 529.

4. In any event fines were improperly imposed on account (a) aliens who were not seeking admission to the United States. *Taylor* v. *U. S.,* 207 U. S. 120; *Dollar Steamship Line* v. *Elting,* 51 F. (2d) 1935; *Cunard Steamship Co.* v. *Stranahan,* 134 Fed. 318. (b) Aliens afflicted with physical disabilities which might affect their ability to earn a living where final determination of admissibility could only be determined at the port of arrival. *Compagnie Francaise a Vapeur* v. *Elting,* 19 F. (2d) 773. (c) Aliens coming by special governmental permission. *Spanish Royal Mail Line Agency, Inc.* v. *United States,* 45 F. (2d) 404; *Compagnie Francaise, etc.* v. *Elting,* 19 F. (2d) 773.

ARGUMENT

FIRST POINT.

THE STATUTE AS CONSTRUED AND APPLIED BY THE DEPARTMENT OF LABOR AND THE LOWER COURTS IS UNCONSTITUTIONAL.

The determination of liability for a fine of the character involved in this action constitutes a case, of which general jurisdiction has been given to the courts of the United States by Article 3, Section 2 of the Constitution, and to the District Courts by the judiciary act (28 U. S. C. 41-1), because it is a controversy which arises under the laws of the United States and involves a penalty (28 U. S. C. 41-9). Section 25 of the Immigration Act of 1917 also in general terms gives jurisdiction to the District Courts in the following language (8 U. S. C. 164):

"That the District Courts of the United States are hereby invested with full jurisdiction of all causes, civil and criminal arising under any of the provisions of this Act * * *."

General jurisdiction of such matters having been given to the Courts of the United States, it cannot be taken away and conferred upon another tribunal or officer except by express terms in an Act of Congress acting within its constitutional limitations.

The lower Courts have declined to exercise this jurisdiction because of their construction of the Immigration Acts.

In *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, this Court upheld the constitutionality of a predecessor of this act, which imposed a penalty of $100, but

limited the scope of the decision by saying that an administrative officer might be validly authorized to enforce the performance of a duty by the exaction of "reasonable money penalties."

That case was a direct challenge to the power of Congress; all the inferences of fact were conceded in favor of the Government. The court held the Act of 1903 within the power of Congress to regulate Immigration under the Commerce Clause.

And the Act was held not to be violative of the due process clause as construed and applied.

In the first aspect, the section was held not to be faulty as imposing criminal punishment without criminal trial when the money penalties provided were small. Secondly it was not faulty as an Act providing for enforcement of such penalties by mere administrative measures, without any judicial trial, in cases where there was no evidence of compliance with the law by the carrier.

If it is the law that Congress can, by legislative fiat, make an exaction of $1095 a penalty which may be committed to the exclusive determination of an administrative officer, then the present Act must be upheld in the first aspect.

The test to be applied is that suggested in *Schick* v. *United States* (1904), 195 U. S. 65, 68:

"The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among the serious or petty offenses, whether among crimes or misdemeanors."

And this principle is fundamental in all matters applying to life, liberty or property. *Manley* v. *Georgia,* 279 U. S. 1.

The exaction now under consideration is $1,095, an amount which has been consistently held by this Court as excessive for administrative enforcement. *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; *U. S.* v. *Regan*, 232 U. S. 37; *Central of Georgia Ry. Co.* v. *Wright*, 207 U. S. 127; *Dukich* v. *Blair*, 3 F. (2d) 302, appeal dismissed 270 U. S. 670.

Congress itself has recognized in this act that $200 may be suitable punishment for a misdemeanor (8 USC s 146), and fines of $1000 under the immigration Act for bringing in contract aliens were regarded by this court as properly requiring plenary judicial trial (*U. S.* v. *Regan*, 232 U. S. 37).

"* * * certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for a crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See Fontenot *v.* Accardo, 278 Fed. 871." Lipke *v.* Lederer (1922), 259 U. S. 557, at p. 562.

The Chief Justice in the *Stranahan* case may have envisioned just such a case as the present one when he limited the scope of administrative functions to the enforcement of "reasonable money penalties." P. 339.

The decisions below and the practice of the Department have construed this Statute to create the most exotic governmental process in all our system. The Statute, so construed, not only creates an offense and provides administrative officers with means to obtain security for the payment of the penalty, by internment of the vessel, but authorizes an administrative officer, in the course of the same proceeding, to pass conclusively on the guilt of the

defendant; and direct appropriation of the security. The Act, so construed, deprives the petitioner of its elemental right to have recourse to the courts. Unlike other Acts relating to administrative authority, this Act, when so construed, does not provide for an appeal or a review of any kind, either judicial or administrative. In no branch of the Government is there a similar power. Since the Act, as a whole, does not expressly deny a judicial trial, but in general terms grants it, the courts below should have pursued the course followed in *Lehigh Valley R. R.* v. *Commissioners*, 278 U. S. 24, where the Statute provided only a limited review from an order of a commission requiring a railroad to eliminate grade crossings. The Constitutionality of that Act was only enforced because the courts construed the Act to permit the common right of judicial trial involving complete examination of the facts. It was only because the Court had so construed the Act that it did not fall within the proscription of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287.

It seems reasonable in this case that the Court instead of finding an implied denial of the right to a full judicial trial should have found an express reservation of this right in section 25 of the Act which grants the District Court jurisdiction in cases arising under it.

In any event the refusal of the lower courts in this case to consider evidence placed before them amounts to an abdication of judicial functions, unwarranted by statute and repugnant to the Constitution.

It may be, however, that the Act is susceptible of construction which would permit its constitutionality to be upheld. It is conceivable that the true construction is that it contemplated, first, the obtaining of security for the payment of penalties by providing for withholding clearance,

and second, preliminary determination of liability by the Secretary of Labor, without intending to deprive the carrier from thereafter proceeding by common law action against the Collector under section 25 of the Act for a plenary judicial determination of its liability for the fine.

Such appears to have been the view entertained by this Court of the effect of the old Customs Laws before special modes of review as by the Board of General Appraisers and the Customs Court had been provided. *Elliott* v. *Swartwout*, 10 Peters, 137.

In the later case of *Louisiana* v. *McAdoo*, 234 U. S. 627, 632, this Court again recognized that there must always be some right of review of administrative determination of judicial questions. It said:

"There have always been remedies by which an importer may recover an excess rate of duty exacted from him by a Customs Collector, either by common law action against the Collector, as in *Elliott* v. *Swartwout*, 10 Peters 137, or by Statute."

While the right to obtain security by summary administrative action cannot be questioned, due process requires ultimate judicial determination where property rights are involved. This was expressly recognized by this Court in *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 595, in relation to taxes:

"Where as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the Government have been consistently sustained * * *. Property rights must yield provisionally to Governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal, may be obtained promptly by writ of habeas corpus * * *".

The right to protection for invasion of property rights may be postponed to a later date upon showing of some Governmental officer.

"Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."

And the Court pointed out that in the income tax system the taxpayer may avail himself of the right of direct appeal to the Board of Tax Appeals, which is peculiar to a certain extent in that findings of fact by the Board of Tax Appeals, if supported by evidence, will be held final in the Court. However, if the taxpayer elects not to appeal, he is entitled, as the Court pointed out in considering the Constitutionality of his remedy by direct appeal, to "judicial review," in which the findings of the administrative officers are not binding.

"The alternative judicial review provided is adequate in both cases" (p. 601).

Heavy punitive fines have been generally held to be subject to judicial review. *Ex parte Young,* 209 U. S. 123; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne,* 224 U. S. 354; *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651; *Southwestern Tel. Co.* v. *Danaher,* 238 U. S. 482; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331.

And Congress, itself, has usually recognized this principle by providing expressly for judicial trial, *e. g.,* The Interstate Commerce Act, 49 U. S. C., s. 16 (9) and 20 (6). Certainly if a civil trial is the proper remedy to secure obedience to orders of the Interstate Commerce Commission, it is equally essential to punish for violation of a statute.

The Shipping Act, Federal Trade Commission Act, and all Acts delegating special powers, recognize the common right to judicial trial. Whenever an alternative trial is provided, carefully selected tribunals are set up and are required to follow substantially judicial procedure, and review by higher federal courts is authorized. Such tribunals are established only when the problems involved are of a highly technical nature which may be more conveniently considered by specialists or where an administrative body is designed to determine questions of general policy which it is its duty to maintain.

No one has suggested that this Act purports to grant anything in the nature of a judicial trial. Even the Stranahan case recognized that. No special training is necessary for the determination of the questions here involved, no general policy is to be determined. The sole function is punishment for a clearly defined statutory offense. There is no reason to believe that Congress intended, if it constitutionally could, to deny judicial trial for the determination of violations of the Immigration Act. The Act of the Department in this case is punitive and not regulatory. No rule is made for the future, nor is the interpretation or application of any rule of the Department in question, nor does this controversy arise under any rule of the Department or involve a determination or effectuation of any policy. The Statute thoroughly defines the offense.

The fact that this case involved immigration tends at first blush to suggest that the matter is political. Immigration matters involving exclusion of aliens are generally political and properly within administrative discretion. It must be borne in mind in this case that the political features involved in the exclusion of Fusco no longer existed when the fine was imposed. Fusco had returned to Italy. The

executive duty to repel Fusco from our midst had been performed and our national health had been preserved. No urgency remained and no further power was needed by the Department in aid of its duty to exclude Fusco. The circumstances might require that someone be punished for bringing Fusco, but there was no urgency about it. The only possibility would be that in certain cases if the boat got out of harbor the United States might be unable later effectively to punish. For that reason there was some urgency that security for the punishment in the form of internment of the vessel be exacted, and this may be within the power of an executive just as a Peace Officer may arrest,—a writ of foreign attachment may issue in admiralty against a non-resident under similar circumstances,—but once security for the ultimate punishment was obtained no governmental interest was furthered by the denial of due process to the defendant.

The difference in the function may be perceived by a comparison of this case with *United States ex rel Polymeris* v. *Trudell, Immigration Inspector,* 284 U. S. 279, where the plaintiff was an immigrant seeking admission to the country and was repelled by the executive at our borders. In our case, Fusco had returned to Italy, the party suing was not an immigrant but was a corporation doing business in the United States and possessing large properties in this country. The punishment in this case is for negligence.

The function of the Interstate Commerce Commission in finding unreasonableness in the past as a fact is judicial. *Arizona Grocery Co.* v. *Atchison Ry.,* 284 U. S. 370, 385.

Even where the Department is dealing with the alien himself and not with a third person, such as a Steamship Company, the Department is limited. Its power is similar to the power of a Peace Officer, to detain an alien only for

a short time for the purpose of exclusion. Any further restraint of the alien in the nature of a punishment for wrongful entry is solely a judicial question which may not constitutionally be delegated to the Department. *Wong Wing* v. *United States*, 163 U. S. 228.

The *Wong Wing* case would appear to be conclusive in this case because of its similarity to the action of the Department here, which is punishment for a past offense. As we have pointed out above, the exaction in this case is clearly punitive, and being such can be determined only by a judicial trial in a civil or criminal action. *United States* v. *Regan*, 232 U. S. 37. In the *Regan* case a penalty of $1,000 for bringing in contract labor was imposed. Judicial trial, of course, was provided. The whole opinion of Mr. Justice Vandeventer in that case illustrates the due procedure necessary to collect a penalty of that amount. The punishment in the *Regan* case was for an offense almost identical with the offense in this case.

There is no need to emphasize the constitutional doctrine of separation of powers. The application here is too obvious. *Springer* v. *Philippine Islands*, 277 U. S. 189, 201; Cf. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210; *Andrews* v. *Hovey*, 124 U. S. 694.

The history of this legislation which shows the gradual encroachment by legislative enactment, of the executive in the judicial field, by a perhaps inadvertent amendment, whereby the exaction of criminal penalties in the sum of $1,095 is said to be vested solely in the executive justifies repetition of the language of this Court in *Boyd* v. *United States*, 116 U. S. 616, 635.

"illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can

only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right as if it consisted more in sound than in substance."

It is submitted that the act as construed and applied by the Secretary of Labor and the lower courts in this case, is unconstitutional.

SECOND POINT.

EXACTIONS OF FINES BY THE SECRETARY OF LABOR UNDER THE ABOVE SECTIONS ARE SUBJECT TO JUDICIAL REVIEW IN CASES IN WHICH IT APPEARS AS A MATTER OF FACT THAT THE ALIENS WERE SUBJECTED TO COMPETENT MEDICAL EXAMINATIONS BEFORE EMBARKATION, AND THAT SUCH EXAMINATIONS DID NOT DISCLOSE THE EXISTENCE OF ANY DISEASE OR DISABILITY WHICH MIGHT BAR THE ALIENS FROM ADMISSION TO THE UNITED STATES.

The Petitioner maintains that it accepted these aliens for passage only after they had been subjected to competent medical examinations, which showed them to be free from any of the diseases or disabilities specified in the statute at the time of foreign embarkation. If that be true, the Secretary of Labor was without power to impose fines, because it was the purpose of the Statute to impose penalties only in those cases in which the carrier failed to comply with its obligation to cause such examinations to be made. That question therefore goes to the jurisdiction of the Secretary to act and is a fundamental question which should be determined *de novo* on all the evidence submitted.

The lower courts rejected all evidence except records of the proceedings before the Department of Labor. The additional evidence which was offered upon the trial and was rejected was of two classes. One related to Departmental practice and the other to the nature, character and extent of medical examinations made by doctors of the Steamship Company before the embarkation and to the measures taken by officials of the company to insure refusal of passage to any alien whose admissibility appeared doubtful.

The evidence falling within the first category consists in part of testimony of United States Consuls at Naples and Genoa and of excerpts from the Consular Instructions issued by the State Department upon the recommendation of the Labor Department, which showed that before an Immigration visa was issued the alien was required to and did submit to a medical examination and presented a certificate of the examining doctor to the effect that he was not suffering from any disease which might bar his admission to the United States (Depositions of Gargiulio and Lawson deposited with Clerk of this Court, and Departmental Instructions, Consular R. 205-212 inc.).

The evidence falling within the second category consists of depositions taken in Italy, comprising the testimony of doctors of the Italian Emigration Service, doctors and officials of the Steamship Company and the evidence of doctors of the Steamship Company offered upon the trial. That evidence shows in detail the precautionary measures which were taken by this Company to assure itself that an alien was free from disease before he was accepted for passage.

A brief statement of the nature and extent of that testimony is contained in the Statement of Facts, *supra.*

A comparison of the medical examinations which were made in Italy and those made on arrival of the immigrants, as described by Drs. Valenzi (Record, pp. 27, 68) and De Sylva (Record, pp. 80-109) on the one hand and Dr. Friedman (Record, pp. 142-198) on the other, shows that the examinations abroad were competent and were more thorough than examinations of the same character which were made upon arrival.

The lower courts erred in rejecting the foregoing evidence, because it went to the fundamental question of the power of the Secretary of Labor to act.

The section under consideration provided for the imposition of a fine "if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time."

While the language of the section is somewhat ambiguous, its history makes it clear that the purpose of Congress was to impose upon steamship companies the obligation of subjecting all immigrants to examinations by competent medical examiners before being allowed to embark, and to empower the Secretary of Labor to impose fines when it appeared that a carrier had failed to perform its obligation and that a disease existed upon arrival which might have been discovered before embarkation *if* the required examination had been then made.

A section of this character first appeared in the Immigration Act of 1903, and it has been reenacted three times without material change, except as to the amount of the

fine, which has been raised from $100 in the 1903 Act to $1,000 and refund of passage money in the 1924 Act.

This section as it appeared in the 1903 Act was before this Court in the case of *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320, which involved solely the question of the constitutionality of the provision. In upholding its constitutionality, this Court construed that provision as follows (p. 332) (italics ours):

"the *power* to impose the exaction which the statute confers on the Secretary is lodged in that officer *only* when it results from the official medical examination at the point of arrival not only that an alien is afflicted with one of the prohibited diseases, but that the stage of the malady as disclosed by the examination establishes that the alien was suffering with the disease at the time of embarkation, and that such fact would have been then discovered *had* the medical examination been then made by the vessel or its owners, as the statute requires."

In support of that construction, this Court quoted from the report of the Senate Committee on Immigration which said of the provision in question (italics ours):

"This sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observance of the law, and leaves in their own hands the power to escape *even a risk* of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by competent medical authority to be entirely cured" (p. 334).

If the Line is protected by a certificate that the alien is cured, it is surely protected by a certificate that he was not afflicted with disease.

That decision was announced in 1909. The interpretation by this Court and by the Senate Committee of the pro-

vision as it appeared in the 1903 Act necessarily attached to the provision as it was reenacted in subsequent legislation.

So construed, the Secretary is without power to impose fines if it appears as a matter of fact that the required medical examinations were made before embarkation.

The Circuit Court of Appeals upheld the exclusion of the evidence relating to examination abroad, apparently on the theory that the satisfaction of the Secretary of Labor is the fundamental fact. It said (55 Fed. (2d) 1050; R. 411, 412):

"The only real issue of fact related to the decision of the Secretary of Labor on the question of detectability of the disability abroad * * * Determination of the fact of foreign detectability of an excluding condition has been left to what will satisfy the Secretary of Labor in that regard. This means that whatever the Secretary of Labor decides, provided his decision is neither arbitrary or capricious, is final."

The foregoing is directly contrary to the construction of the same language which this Court deemed necessary to uphold its constitutionality in *Oceanic Steam Navigation Co.* v. *Stranahan, supra.*

Furthermore, the decision imposed upon transportation companies the liability of an insurer, for the Circuit Court of Appeals said (R. 413):

"It takes no account of any mistakes an examiner might make and still be a competent man. The burden placed upon a steamship company transporting aliens to our shores is not satisfied by its employing competent examiners to make examination of aliens at the time of embarkation, but it is charged with whatever knowledge it would obtain from a competent examination of each alien at that time."

It is inconsistent with the plain meaning of the language of this section to treat the obligation of the carrier as that of an insurer. The provision that liability for a fine shall attach only in the event that one of the diseases or disabilities existed at the time of foreign embarkation and might have been discovered by means of a competent examination at that time, is incompatible with the idea that liability was intended to attach in cases where it has been established that the alien was accepted only after a competent medical examination showed him to be free from the proscribed diseases or disabilities. The same section imposes a fine for bringing illiterate aliens and aliens native of the Continent of Asia "if it shall appear to the satisfaction of the Secretary of Labor that these disabilities *might have been detected by the exercise of reasonable precaution* prior to the departure of such aliens from a foreign port." The determination of illiteracy and nationality is a more simple matter than the determination of the existence of disease, but Congress saw fit to impose not an insurer's liability but only liability for failure to exercise reasonable precaution. The words "might have been detected by" are used in defining both obligations, and intend in both cases to require only the exercise of reasonable diligence.

That is the only interpretation which is consistent with the legislative history of the section, heretofore referred to, or with the general scheme of the Immigration Act which does not contemplate the exaction of fines except for negligent or intentional violations of the law. *Taylor* v. *United States*, 207 U. S. 120; *Cunard S. S. Co.* v. *Stranahan*, 134 Fed. 318.

While the section under consideration seeks to prevent the entrance into the United States of aliens who are afflicted with the enumerated diseases or disabilities, it does not

provide for a penalty against the carrier upon a mere showing of the existence of the disease upon arrival.

The penalty is incurred only if it shall appear that the disease existed before foreign embarkation in such form that it might have been discovered by competent medical examination. Or, paraphrasing the construction applied in the Stranahan case and announced in the Report of the Senate Committee, the penalty is incurred if it shall appear that the disease existed before foreign embarkation and might have been discovered *if* a competent medical examination had then been made. Penalties were contemplated only in cases of the negligent or intentional failure to comply with the statute. So construed the Secretary was acting outside the scope of his authority in imposing fines, once it had been shown that the aliens had been subjected to competent medical examinations before embarkation. The evidence that such examinations had been made is undisputed in this case.

The essential or fundamental question in this case therefore is whether these aliens had been subjected to competent medical examination before embarkation, or at most whether the diseases or disabilities with which they were alleged to be afflicted upon arrival existed in discoverable form at the time of foreign embarkation; and those are the points to which the excluded evidence was directed.

The situation involved in *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, was analogous. The question there presented was whether the case which had been presented to the Federal Trade Commission was one of public interest. The Commission was authorized to proceed under the Statute:

"* * * if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public."

This Court held that those were complementary words of limitation upon the jurisdiction of the Commission and then said (p. 649):

"Thus, the commission is called upon first to determine, as a necessary prerequisite to the issue of a complaint, whether there is reason to believe that a given person, partnership or corporation has been or is using any unfair method of competition in commerce; and that being determined in the affirmative, the commission still may not proceed unless it further appear that a proceeding would be to the interest of the public, and that such interest is specific and substantial * * *. Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions."

It has been uniformly held by this Court that the existence of facts upon which the authority of an administrative officer to act depends is always subject to judicial review.

The following have been held by this Court to be fundamental questions open to judicial review:

The relation of employer and employee. *Crowell* v. *Benson*, 285 U. S. 22.

The citizenship of an alien. *Ng. Fung Ho* v. *White*, 259 U. S. 276.

Whether an article sought to be taxed was a dutiable article. *In re Fassett*, 142 U. S. 479.

Whether the person involved was an enlisted soldier subject to military service. *In re Grimley*, 137 U. S. 147.

Whether the article was a book or periodical, and whether the article was excludable mail matter. *Smith* v.

Hitchcock, 226 U. S. 54, *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94. Here the fundamental question was not restricted to whether the article was mail, but extended to the class or status of the article.

The existence or non-existence of competition. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19.

The same doctrine was applied in *Miller* v. *Horton*, 152 Mass. 540, the fundamental question being whether a horse was afflicted with a contagious disease.

In all such cases the Court declined to consider itself bound by the finding of the Administrative officer and held that the question was one which should be determined by the Court itself according to its own mode of procedure. As was said by this Court in *Crowell* v. *Benson*, *supra* (p. 56):

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the

Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

The same principle was stated by Mr. Justice Holmes in *Miller* v. *Horton, supra,* where the defense sought to justify the killing of a horse on the ground that an administrative body had found that he had glanders. That question was held to be open to judicial review in the following words:

"* * * Accordingly we are of opinion that the authority and jurisdiction of the Commissioners to condemn the plaintiff's horse under section 13 was conditional upon its actually having glanders * * *."

"The fact as to the horse having the disease was open to investigation in the present action, and on the finding that the horse did not have it, the plaintiff was entitled to a ruling that the defendants failed to make out their justification."

A fundamental or jurisdictional question of this character may be resolved as a mere matter of law, when there is no dispute as to the facts, *School of Magnetic Healing* v. *McAnnulty, supra,* p. 109. If the facts are disputed, the determination will be made by a trial *de novo, Crowell* v. *Benson, supra,* and like cases.

Furthermore, as was said in *Crowell* v. *Benson, supra,* the Courts of the United States are always open to an independent determination of all questions both of fact and law where the enforcement or protection of constitutional rights are involved. *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287.

It is submitted, therefore, that the lower Courts erred in excluding the evidence which established the facts upon the basis of which the power of the Secretary to impose fines must be determined.

That evidence establishes so conclusively that these aliens were subjected to competent examinations before embarkation, as required by the statute, and that the diseases and disabilities complained of either did not then exist or were not then detectable, that we have the finalty of fact which becomes finalty in law. The Secretary of Labor clearly acted beyond the scope of his authority and the decision of the Circuit Court of Appeals as to all causes of action except the 9th and 11th should be reversed with directions that judgment be entered in favor of the petitioner.

THIRD POINT.

IRRESPECTIVE OF THE EVIDENCE REJECTED BY THE LOWER COURTS THE PETITIONER SHOULD RECOVER BECAUSE THE DEPARTMENT OF LABOR ERRONEOUSLY CONSIDERED THE OPINION OF THE PUBLIC HEALTH SURGEONS CONCLUSIVE PROOF OF LIABILITY; BECAUSE THE FACTS BEFORE THE DEPARTMENT DID NOT SUPPORT THE FINDING OF LIABILITY; BECAUSE THERE WAS EVIDENCE IN THE POSSESSION OF THE DEPARTMENT BUT NOT CONSIDERED WHICH NEGATIVED LIABILITY AND BECAUSE THE DETERMINATION OF LIABILITY WAS NOT MADE BY THE AUTHORIZED OFFICER.

The proofs before the Department of Labor at the time the fines were imposed are set forth in the Record, pp. 214-341. Such proofs consist in every case of the minutes of the Board of Special Inquiry and the protest of the Line. It is not feasible to attempt a detailed consideration of the

evidence submitted by the Line in the form of a protest in each case and the discussion of the Fusco case is continued as illustrative. The facts of that case are set forth, *supra*, pp. 3-11. The proofs are more elaborate in that case than in some of the others but it serves to emphasize the lack of impartial consideration on the part of the Department because the result was the same regardless of the nature or extent of the proof.

The evidence relied upon to support the finding of liability was identical in each case and consisted of a certificate by the doctors who examined the alien after arrival, certifying to the existence of a disease with an opinion always in the following form:

"In our opinion the condition herein certified might have been detected by competent medical examination at the foreign port of embarkation" (R.., 215, 232, 240, 247, 254, 263, 269, 272, 288, 303, 317, 340, 393).

The medical certificate to the effect that a disease was discovered after arrival and the opinion mentioned was the extent of proof supporting the liability in all cases. No facts were stated concerning the stage of the malady or the extent or nature of the symptoms which might justify such an opinion.

The decisions of the Department of Labor imposing these fines show that the Department erroneously treated these opinions as conclusive proof of the liability of petitioner under the Statute.

In more or less stereotyped language these decisions uniformly held the so-called "official medical certificate" conclusive (R., 214, 222, 235, 246, 252, 257, 264, 271, 278, 296, 307, 334, 391).

In the *Fusco* case the Department clearly ignored the evidence submitted by the petitioner, for it said:

"The alien gave no history of the disease. Indeed, he was not questioned with regard thereto, and the only evidence in the record is the official certificate itself" (Rec. 278).

It further said:

"It is believed that the evidence placed in the record by the company is not sufficient to call in question the accuracy of the opinion expressed in the official medical certificate" (Rec. 278).

Those statements coupled with the testimony of J. W. Browning, an employee of the Department, who wrote the decision, show conclusively that the Department treated the opinion embodied in the so-called "official medical certificate" as the only evidence before the Department for consideration. Mr. Browning testified that the protests of the petitioner were not evidence; that he considered the Department of Labor an Appellate Court and that he took the protests only as pleas or petitions, not as evidence of the facts represented (Rec. 131, 132, 136).

The action of the Department of Labor in thus ignoring the protests and medical certificates submitted by the petitioner as having evidentiary value and treating the opinion in the so-called "official medical certificate" as conclusive was based upon an erroneous interpretation of the law, which may have arisen from the fact that Section 17 of the 1917 Act (8 U. S. C. 153), makes the certificate conclusive upon the Board of Special Inquiry of the existence of a disease upon arrival for the purpose of exclusion, and Section 35 of the Act (8 U. S. C. 169) makes the certificate

conclusive of liability for the $50 fines there provided for bringing in diseased seamen.

The Section under consideration contains no provision which authorizes the use of such a certificate as conclusive evidence, or indeed as any evidence at all, in imposing fines under this Section. The fact that Section 35 limits the fine to $50 and expressly gives the Secretary discretion to remit such fines, where the certificate is made conclusive, is impressive evidence of the fact that it was not intended to be given that effect in the much larger fines prescribed in Section 9 as amended by Section 26 of the 1924 Act.

On this point the District Court said:

"It has been argued that the Secretary should not treat the medical certificate or opinion as conclusive upon him, although the Supreme Court in the Stranahan case indicated that the Secretary would be warranted in attaching conclusive weight to it. Be that as it may, the records of these proceedings before the Secretary do not indicate that he considered himself bound by the medical certificate or opinion. On the contrary, he afforded to the plaintiff the opportunity to convince him that the medical certificate or opinion was erroneous." (R. 355.)

The Circuit Court of Appeals, after citing the Stranahan case, said:

"Nor was it error to treat the certificate of the medical examiners as evidence of the facts therein stated. They were reports of examinations made in the performance of their official duty and were a part of the record before the Secretary. United States *ex rel.* Feuerstein *v.* Tod. 296 F. 127. Compare U. S. *v.* Day, 33 F. (2d) 267." (R. 412.)

The cases relied upon as authority for the foregoing statement are cases in which the exclusion of aliens was

upheld in reliance upon the finality given to the medical certificate in such cases by 8 U. S. C. 153, which provides (italics ours):

"The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the *rejection of aliens* affected with * * *."

The implication to be derived from these citations by the Circuit Court of Appeals can only be that, that Court considered the medical certificate conclusive evidence to sustain liability. Indeed Judge Learned Hand, speaking for the Court in *United States* v. *S. S. Presidente Wilson*, decided subsequent to this case, makes it plain that such is their construction of the statute. See 56 F. (2d) 742 at 743. Although the District Judge did not rest his opinion on that ground, he stated that the *Stranahan* case supported the proposition.

In the *Stranahan* case (214 U. S. 320) it clearly appears from the report in the Circuit Court (155 Fed. 428) that the Steamship Company admittedly had not subjected the aliens to any medical examination prior to embarkation. The Company conceding this fact to the Government contested the validity of the Statute on Constitutional grounds, contending that notwithstanding its failure to examine, the fine could not be sustained. This Court construing the Statute as imposing a sanction to a duty admittedly not performed, held that the preliminary fact necessary to establish the case of the Government, *i. e.*, that the alien was diseased on arrival, could be established by the medical certificate.

The scope of the language used in that case, therefore, must be limited to the circumstances under consideration

and cannot be extended to a case where examinations before embarkation admittedly had been made.

The treatment of the medical certificate as conclusive was an error of law, which in itself justifies a reversal. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42.

Nor can the fines be supported on the theory of the District Judge that there was adequate evidence before the Department to uphold the findings.

As was said by the New York Court of Appeals in *Matter of Case*, 214 N. Y. 199, 203.

"Insufficient evidence is, in the eye of the law, no evidence," and "When we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

In the *Fusco* case, as previously pointed out, the Department had before it the uncontradicted statements contained in the protest that the Petitioner regularly employed competent physicians who made careful examinations of each alien before embarkation; that this alien was subjected to three separate medical examinations before embarkation, and was accepted for passage only because such examination did not disclose the existence of any prohibited disease or disability (R. 282). It also had before it an authenticated copy of the certificate of two of the examining doctors who made an examination before embarkation (R. 286) and an affidavit of one of those doctors sworn to after the rejection of the alien certifying that prior to embarkation he made an accurate examination and found

the alien free from symptoms of any disease whatever (R. 284, 285).

Opposed to this evidence the Record showed nothing except the so-called "official medical certificate," issued upon an examination eighteen days after the embarkation of the alien.

Such certificates have been held not to be competent proof unless accompanied by a statement of supporting facts.

> *U. S. ex rel. Fong On* v. *Day*, 39 F. (2d) 202;
> *U. S. ex rel. Papa* v. *Day*, 45 F. (2d) 435.

Certainly the Record establishes that at least three qualified Doctors examined the alien prior to embarkation and if that is the extent of the obligation imposed upon Petitioner then there is no evidence to support the imposition of the fine. The opinion of the Public Health Surgeons at most can only be taken as an attack on the competency of the Line's Doctors.

The facts stated in the protest and the certificates submitted therewith were proper proof of the matters alleged. *Bermuda & West Indies S. S. Co.* v. *Elting* (S. D. N. Y.), 45 F. (2d) 411. The district judge conceded our proof established the truth and conceded that a certificate of an American Consular doctor made about the time of embarkation, in accordance with present practice, would be conclusive evidence of non-discoverability at that time (R. 361).

The examinations shown by the evidence in this case were of the same character as those conceded to be sufficient by the district judge, except that they were made by Italian doctors.

The district court must accept the truth of the statements of the protest. It could not decline legal proof of the true facts in the case because not submitted in that form to the department and at the same time measure the proof before the Secretary by judicial standards. Both courts comment on the technical deficiencies of petitioner's proof. The courts must have failed to accept the evidence purported to have been accepted by the Department; or must have applied the scintilla of evidence rule. In no other way could they support a finding on a concededly disproven point.

The petitioner submits that the opinion of the Public Health Surgeons without facts to support that opinion or anything to show whether they knew the qualifications of the doctors abroad, is not sufficient to support a finding that Doctors Musu, Calise, Valenzi and Dandini and the surgeons of the Royal Italian Emigration Service were incompetent, or that their examinations were not competent examinations. *Gegiow* v. *Uhl,* 239 U. S. 3; *Chin Yow* v. *U. S.,* 208 U. S. 8; *Tisi* v. *Tod,* 264 U. S. 131; *Kwock Jan Fat* v. *White,* 253 U. S. 454; *Johnson* v. *Damon,* 16 F. (2) 65; *Mason* v. *Tillinghast,* 27 F. (2) 580.

Furthermore, the Department had in its possession but did not consider or incorporate into its record evidence which established that a competent examination would not have detected the existence of these diseases at the time of embarkation. This evidence consisted of the certificate of a doctor chosen by the American Consul and annexed to the alien's immigration visa which could not have been issued, under the regulations, unless the alien had been certified to be free from the prohibited diseases and disabilities. The Consular Regulations (R. 205-212), Sections 162 and

164 (R. 207), provide that all immigrants are required to present medical certificates showing "completely, correctly and conclusively their physical condition * * *," and further, "No certificate will be accepted unless it has been issued by a reputable physician and unless it is complete in all respects needful in the premises." These rules were prescribed by the Secretary of State on the recommendation of the Secretary of Labor (8 U. S. C. 222). This certificate came into the possession of the Department of Labor on the arrival of the alien and was sent to Washington (Rule 3, Subdivision G, par. 3, Regulations of July 1, 1925, appendix *infra*).

Likewise a sworn statement on the ship's manifest signed by the ship's doctor establishing that Fusco had been examined before embarkation and showed no evidence of disease, although in the possession of the Department, was not considered. This certificate is provided for in the Statute itself (8 U. S. C., Sec. 149). The certificate of the examining doctor at Ellis Island is likewise contemplated by statute, but it is declaratory only of the condition on the date of examination after arrival.

It thus appears that three statutory medical certificates were issued, two speaking of a fact and the third speaking of an opinion derived from a fact. All had come into the possession of the Department. The Secretary's decision ignored the factual certificates and considered itself bound by the opinion certificate. This lawless practice was not commented on by the lower courts. Such departure from the course of legal procedure should be corrected. *Chin Yow* v. *United States*, 208 U. S. 8.

Failure to incorporate into the record of an administrative proceeding, all of the evidence which was before

the administrative officer, in itself, justifies judicial review. *Kwock Jan Fat* v. *White* (1920), 253 U. S. 454.

By treating the opinion in the so-called "official medical certificate" as conclusive, the Secretary of Labor in effect delegated his entire power of determining liability for fines under this section to the doctors of the American Health Service who made the examinations.

In addition to this, he left to subordinates in his office the function of granting a semblance of hearing.

That is shown by the decision in the *Fusco* case which was written by J. W. Browning, signed by Harry E. Hull, Commissioner General, and approved *pro forma* by W. W. Husband, second assistant secretary (Rec. 277-278). The Secretary himself took no part in the consideration of that case or any of the others (Rec. 132-133).

The imposition of the fine was a function of a judicial nature, committed by the Statute to the personal judgment of the Secretary of Labor, and could not be delegated.

Runkle v. *United States*, 122 U. S. 543;
New Jersey Wholesale Drug Co. v. *Brown*, 289 Fed. 108;
Bay State Wholesale Drug Co. v. *Potter*, 277 Fed. 529.

On this point the Court in *Runkle* v. *United States, supra,* made the following observations, page 557:

"Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide

personally whether they ought to be carried into effect. Such power he cannot delegate."

To summarize; the decision of the Department of Labor was erroneous in law, because it treated the so-called "official medical certificate" as conclusive: the evidence submitted by the Petitioner established conclusively that it had performed the obligation laid upon it by the statute, and the decision imposing the fine was invalid, in any event, because it was not made by the officer designated to make it.

FOURTH POINT.

OTHER ISSUES PRESENTED BY THE RECORD IN SPECIFIC CASES INVOLVE CONSIDERATIONS IN ADDITION TO THOSE HERETOFORE DISCUSSED.

The special class of cases here referred to are those involved in the 5th and 12th causes of action, in which the aliens were going in transit to Canada; the 14th cause of action, in which the alien was a seaman coming to the United States to join the crew of another vessel; the 2nd, 3rd and 13th causes of action, in which the aliens were excluded on the ground that they were suffering from disabilities which might affect their ability to earn a living; the 13th and 15th causes of action, in which the alien was brought to the United States by express governmental permission.

ALIENS NOT COMING FOR ADMISSION.

In the 5th and 12th causes the aliens were not seeking admission to the United States but were going to Canada

and sought only the right to go in transit through the United States (R. 254, 301). Both of the aliens were in possession of transit visas issued by a United States consul (R. 254, 301). Notwithstanding the fact that the aliens did not seek admission to the United States the Board of Special Inquiry undertook to pass upon their admissibility into the United States and ordered them excluded one because afflicted with trachoma, the other because he was feebleminded, but only after the two aliens had been rejected by the Canadian Immigration Officers (R. 255, 303).

In the 14th cause of action the alien was a seaman coming to the United States together with other members of the crew of the *S.S. Pennsylvania* under contract with the owners of the vessel to serve on the vessel for a voyage to Italy (R. 339, 340, 341). The alien did not seek admission to the United States but asked only the right to transship to the *Pennsylvania* (R. 341). Again the Immigration Authorities although not called upon to do so, undertook to pass upon the admissibility of the alien and ordered his deportation (R. 341).

The statute provides that it shall be unlawful to "bring to the United States" certain classes of aliens. In order to determine whether a steamship company which transports to the United States aliens who do not seek admission as immigrants (*i. e.* non-immigrants) falls within the prohibition of the statute it is necessary to look to the purpose of the statute.

The 1917 Act is entitled as an "Act Regulating Immigration of Aliens to and Residence of Aliens in the United States."

The 1924 Act is entitled an "Act to Limit the Immigration of Aliens to the United States and for Other Purposes."

The words "bringing an alien to the United States" were construed in the case of *Taylor* v. *United States*, 207 U. S. 120, in which it was said:

"The reasoning is not long. The phrase which qualifies the whole section is, 'bringing an alien to the United States.' It is only 'such' officers of 'such' vessels that are punished. 'Bringing to the United States,' taken literally and nicely, means, as a similar phrase in Section 8, plainly means, transporting with intent to leave in the United States and for the sake of transport—not transporting with intent to carry back, and merely as incident to employment on the instrument of transport."

Clearly the intentions of Congress in passing the act was to bar diseased aliens and aliens who were affiicted with a physical disability which would affect their ability to earn a living because such aliens would be undesirable residents and citizens of the United States. Such a reason does not apply to aliens coming to the Untied States merely for the purpose of transit through the United States to another country or to transship in the Harbor of New York.

The reasoning of the department and of the lower courts that Congress intended by this Section to protect our national health from contagion is unsound. The alien in the 12th cause of action was excluded for feeblemindedness which is not contagious and Petitioner was fined.

The same section which defines the penalty for bringing diseased aliens to the United States defines with the same words a penalty for bringing an illiterate alien, an alien afflicted with a physical defect or an alien excluded because a native of the continent of Asia. Certainly illiteracy, ordinary physical defects and yellow skins are not contagious.

The Department itself recognizes that bringing illiterate aliens for transit is not a violation of the Act, because it does not even require literacy tests of aliens going in transit. Rule 2, Subd. M, par. 1e (Rules Jan. 1, 1930; Appendix *infra*).

It is desirable, of course to prevent the transit of aliens or anyone else for that matter through the United States who may be suffering from contagious disease but as pointed out in the case of *Dollar Steamship Line* v. *Elting*, 51 Fed. (2d) 1035, that is a matter for quarantine regulation under the quarantine laws. In that case an alien holding a through ticket to Cuba was rejected at New York because suffering from trachoma and a fine was imposed on the steamship company by the Department of Labor. It was held by the Circuit Court of Appeals for the Second Circuit that the alien was not brought to the United States within the prohibition of the statute and that the fine was improperly imposed.

The fact that Congress did not intend that fines provided for in this section should be applicable to the bringing of aliens not applying for admission to the United States is demonstrable by other provisions of the Act.

Section 3 of the Act (8 U. S. C. 136) provides for the exclusion "from admission into the United States" of certain classes of aliens including illiterates, diseased aliens, Asiatics, &c.

In a proviso to the same section (8 U. S. C. 136 Q) it is provided:

"That the Commissioner General of Immigration with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exactions of such bonds as may be necessary, to control and regulate the admission

and return of otherwise inadmissible aliens applying for temporary admission."

It is clear therefore that the term "admission", as used in the first sentence of Section 3 contemplates those applying for admission as immigrants to the United States, and does not apply to those seeking only temporary admission in contemplation of departure or for the purpose of going in transit.

It follows that Section 9 and the same section as amended by Section 26 of the 1924 Act did not contemplate the imposition of penalties for bringing aliens to the United States for such temporary purpose, for that section provides:

"That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to Section 3 of this act exempted from the excluding provisions of said section." Cf. *Dollar Steamship Co.* v. *Hyde*, 23 F. (2d) 910.

It is submitted that Congress clearly did not intend Section 9 to be applied to cases of transit aliens or to the transportation of any aliens not seeking residence within the United States. *Taylor* v. *U. S., supra; Dollar S.S. Co., Lt.* v. *Elting, supra; Cunard Steamship Co.* v. *Stranahan,* 134 Fed. 318.

Aliens Having Physical Defects.

In the 2d, 3d and 13th causes of action the fines were imposed because the alien was afflicted with a physical defect which might affect his ability to earn a living. In addition to the question of discoverability of the defect heretofore discussed there is the question as to whether

the defect if discovered would affect the ability of the alien to earn a living. In the 2d cause of action the alien was certified as being afflicted with an abnormal systemic condition characterized by a positive Wasserman reaction in the blood serum (R. 232). The Department of Labor by a subsequent decision of the Surgeon General recognized that such a condition could not properly be said to have been detectable by a competent medical examination at the foreign port of embarkation (R. 204). Clearly, this fine was improperly imposed.

In the 3d cause of action the alien was certified as afflicted with valvular disease chronic cardiac (R. 240). The alien testified before the Board of Special Inquiry that he was always working and was never sick (R. 241).

In the 13th cause of action the alien was blind (R. 317) but was coming to the United States temporarily not to earn a living but to study in the New York Institute for the Education of the Blind (R. 311). There was ample evidence that there was no danger of his becoming a public charge (R. 330-332). In such cases the Secretary has express authority to admit on bond (8 U. S. C. 158).

It cannct be said that every physical defect is one which might affect one's ability to earn a living. Whether it may have that effect or not depends upon many circumstances, including the nature of the defect, the means of livelihood ordinarily employed by the alien, and the judgment of the officials whose duty it is to determine the question. It is not a question solely for medical consideration.

The question can only be determined finally by the Board of Special Inquiry upon arrival, and to impose the burden of determining that question upon the steamship company is to deny to the alien his right to be heard as to his admissibility by the duly constituted authority.

The possession of the visa by the United States consul is evidence that in the opinion of an officer of one department of the Government the alien was admissible.

As shown by the letter of the Department of Labor in the case of *Compagnie Francaise a Vapeur* v. *Elting*, 19 F. (2d) 773, the department declines to pass upon the admissibility of the alien until after examination at the port of arrival.

Where the question of admissibility is of a *quasi* judicial nature, which is finally determinable only after arrival the right of a steamship company to bring such aliens here for examination should be uncontestable. *Compagnie Francaise a Vapeur* v. *Elting, supra.*

That the admissibility of such aliens presents a question of *quasi* judicial nature is further established by the fact that they may be admitted in the discretion of the Secretary of Labor, notwithstanding their physical defects, on the conditions prescribed in Section 21 of the 1917 Act (8 U. S. C. 158).

ALIENS COMING BY SPECIAL PERMISSION.

The fine involved in the 13th cause of action was imposed on the ground that the alien was blind, a disability which might affect his ability to earn a living. That he was blind was evident, but he claimed to be coming to the United States as a student. He held an immigration visa issued by the American Consul under section 4 (e) of the Act of 1924 (8 U. S. C. 203), which exempts from the quota students going to accredited schools.

Such a school must be one which has been approved by the Department of Labor. A list of such accredited schools is supplied to all American Consuls, and under the Consular instructions a consul is not permitted to grant non quota visas under section 4 (e) except to per-

sons who are able to satisfy him that they are in good faith coming to such an accredited school.

The decision of the Department imposing this fine (R. 306) shows that the real reason for imposing the fine was not the blindness of the alien but the fact that the alien had not been enrolled as a student in a school approved for aliens by the Secretary of Labor (R. 307). That error cannot be charged to Petitioner. That question could only be properly determined either by the American Consul pursuant to Consular Instructions 140, 141, 142 (R. 205, 206) or by Immigration Officials at the port of arrival. The case therefore properly falls within the principles of *Compagnie Francaise* v. *Elting,* 19 F. (2d) 773, and *Spanish Royal Mail Line Agency, Inc.* v. *United States,* 45 F. (2d) 404.

That this alien satisfied the American Consul at Naples of his right to come to the United States as a student is shown by the consul's visa and by the testimony of William Gargiulio of the American Consulate at Naples, which is on file with the Clerk of this court. Mr. Gargiulio testified that he was unable to find the application and supporting documents which were presented for this visa, but said that he remembered the case very well, and in answer to questions put to him testified as follows:

"Q. Can you state definitely that at the time he applied for a visa he was definitely enrolled as a student in a school of the United States approved by the Secretary of Labor? A. As far as I remember, yes.

"Q. What makes you remember that? A. Because otherwise he would not have got a visa as a student teacher."

The fine involved in the 15th cause of action was imposed on the ground that the alien was an imbecile. The

father of the alien, an American citizen, had made special application to the Labor Department for permission to bring his son to the United States, and in that application disclosed his condition (R. 394). The Labor Department specially authorized the American Consul in Italy to grant a visa to this alien, and he was accepted for transportation on the faith of the visa granted pursuant to such special authorization (R. 399-403). These documents were evidence either that the Department had already decided that this alien was admissible or had reserved the question for final determination at the port of arrival. By this an estoppel had been created against the imposition of the fine. *Spanish Royal Mail Line Agency, Inc.* v. *United States,* 45 F. (2d) 404; *Compagnie Francaise* v. *Elting,* 19 F. (2d) 773.

Conclusion.

The decision of the Circuit Court of Appeals should be reversed as to all causes of action except the 9th and 11th and the case should be remanded to the District Court with instructions to enter judgment for the Petitioner.

Respectfully submitted,

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October, 1932.

APPENDIX.

Section 9 of the Immigration Act of 1917 as amended by Section 26 of the Immigration Act of 1924. Amendments of 1924 printed in italics.

SEC. 9. That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 (*$1000*), and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien afflicted with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in section three of this act, and if it shall appear to the satisfaction of the Secretary of Labor

that any alien so brought to the United States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $25 (*$250*), and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien for whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien who is excluded by the provisions of section three of this act because unable to read, or who is excluded by the terms of section three of this act as a native of that portion of the continent of Asia and the islands adjacent thereto described in said section, and if it shall appear to the satisfaction of the Secretary of Labor that these disabilities might have been detected by the exercise of reasonable precaution prior to the departure of such aliens from a foreign port, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $200 (*$1000*), and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. *If a fine is imposed under this section for the bringing of an alien to the United States, and if such alien is accompanied by another alien who is excluded from admission by the last proviso of section 18 of this act, the person liable for such fine shall pay to the collector of customs, in addition to such fine but as a part thereof, a sum equal to that paid by such accompanying alien for his transportation from his initial point of departure indicated in his ticket,*

to the point of arrival, such sum to be delivered by the collector of customs to the accompanying alien when deported. And no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded: Provided, That clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines *or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs:* Provided, further, That nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to section three hereof exempted from the excluding provisions of said section.

Rule 3, Subdv. G, par. 3, Rules of July 1, 1925.

"Par. 3.—When an immigrant has been excluded from admission to the United States the immigration visa shall be retained at the port of arrival until the deportation or return of the alien actually takes place, whereupon the visa shall be forwarded forthwith to the department with an indorsement in the space designated 'Record on appeal' showing that alien was rejected and returned, the date of such return, and signed by the proper immigration official."

Rule 2, Subdv. M, par. 1, Rules of Jan. 1, 1930.

"Paragraph 1. The following classes of aliens over 16 years of age are exempted by law from the literacy test; viz:

"(a) Persons who are physically incapable of reading.

"(b) Persons of any of the following relationships to United States citizens, admissible aliens, or legally admitted aliens, when such persons are sent for or brought

in by such citizens, admissible aliens, or admitted aliens: Father, if over 55 years of age; grandfather, if over 55 years of age; wife; mother; grandmother; unmarried daughter; or widowed daughter.

"(c) Persons seeking admission to the United States to avoid religious persecution in the country of their last permanent residence.

"(d) Persons who have been lawfully admitted to the United States and who have resided therein continuously for five years and who have returned to the United States within six months from the date of their departure therefrom.

"(e) *Persons in transit through the United States.*

"(f) Persons who have been lawfully admitted to the United States and who later go in transit from one part of the United States to another through foreign contiguous territory. The period an alien may remain in foreign contiguous territory while in transit under this exemption shall be limited to 60 days. An alien may leave and enter the United States at the same port and still be in transit within the meaning hereof.

"(g) Exhibitors and employees of fairs and expositions authorized by Congress."